

# How the concept of essential elements of a legislative act continues to elude the Court

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# COMMON MARKET LAW REVIEW

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## **Aims**

The Common Market Law Review is designed to function as a medium for the understanding and implementation of European Union Law within the Member States and elsewhere, and for the dissemination of legal thinking on European Union Law matters. It thus aims to meet the needs of both the academic and the practitioner. For practical reasons, English is used as the language of communication.

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## **How the concept of essential elements of a legislative act continues to elude the Court. *Parliament v. Council***

Case C-355/10, *European Parliament v. Council of the European Union*, Judgment of the Court of Justice (Grand Chamber) of 5 September 2012, nyr.

### **I. Introduction**

Although this case relates to the pre-Lisbon comitology regime, the question put to the Court is also of vital importance for the post-Lisbon regime of delegated acts under Article 290 TFEU. This provision prescribes that the dividing line between (formal) legislation and delegated acts corresponds to the dividing line between the essential and non-essential elements of legislation, whereby delegated acts can only deal with non-essential elements. The distinction between essential and non-essential elements was already present in the old comitology regime, ever since the *Köster* case. It was also a cornerstone of the 2006 amendment of the second comitology decision, which introduced the Regulatory Procedure with Scrutiny (PRAC) providing for a substantial increase in the Parliament's power compared to the then existing comitology procedures, although it still did not put it on par with the Council as Article 290 TFEU now does.<sup>1</sup>

In the present case, the Parliament challenged a decision of the Council, adopted under the PRAC, implementing the Schengen Borders Code (SBC) because the decision allegedly touched upon essential elements of the SBC.<sup>2</sup> Article 12(5) of SBC,<sup>3</sup> the enabling clause of the contested decision, provides that “[a]dditional measures governing surveillance may be adopted. Those, designed to amend non-essential elements of this Regulation by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny.” Following the entry into force of the Lisbon Treaty,

1. To be precise, Art. 290 TFEU puts the Parliament *virtually* on par with the Council. See Driesen, “Delegated legislation after the Treaty of Lisbon: An analysis of Art. 290 TFEU”, 35 *EL Rev.* (2010), 847.

2. Decision (EU) 2010/252 of the Council supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, O.J. 2010, L 111/20.

3. Regulation (EC) 562/2006 of the European Parliament and of the Council establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) O.J. 2006, L 105/1.

the references to the PRAC in the existing legislation are being amended and replaced with references to Article 290 TFEU and in the future the additional measures under Article 12(5) SBC will therefore be adopted by the Commission through delegated acts.<sup>4</sup> It is therefore clear that the implications of the Court's ruling in this case go far beyond the implementation of the SBC.

## 2. Factual and legal background

The rules contained in the contested decision had been adopted to streamline Frontex operations. Frontex is the EU agency responsible for supporting the Member States in the management of the external borders, and has the competence to coordinate border surveillance operations by the Member States. Border surveillance itself is defined in the SBC as “the surveillance of borders between border crossing points and the surveillance of border crossing points outside the fixed opening hours, in order to prevent persons from circumventing border checks”; its main purpose is “to prevent unauthorized border crossings, to counter cross-border criminality and to take measures against persons who have crossed the border illegally”. Examples of Frontex' coordinated operations are Poseidon and Hermes.<sup>5</sup>

In its operations at the EU's southern border (i.e. the Mediterranean Sea), Frontex has been confronted with boat refugees, persons often in distress and requiring assistance. This led to a number of problems since Frontex had not been established as a search and rescue agency and the different Member States cooperating in Frontex missions interpret the relevant rules of international law, *inter alia* the principle of non-refoulement, differently. Commonly agreed rules at EU level on what to do in such situations were therefore necessary. Because these problems arose during border surveillance operations, which are foreseen in Article 12 SBC, the Commission proposed to use Article 12(5) SBC to adopt these rules and presented a draft decision to this end to the relevant comitology committee. The draft did not acquire the

4. The Commission has already made a proposal to update the SBC and replace the references to the PRAC with references to Art. 290 TFEU. See European Commission, Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 562/2006 of the European Parliament and of the Council establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) and the Convention implementing the Schengen Agreement, COM(2011)118 final.

5. The Poseidon operation targets the illegal migration at the Turkish-Greek Border. The Hermes operation was initiated at the request of Italy because of the large influx of North-African immigrants around the isle of Lampedusa.

needed support within the Committee, which meant that the Commission, under the PRAC rules, forwarded its draft to the Council.<sup>6</sup>

Under the heading “interception”, the Commission’s draft proposed important material rules by listing the measures which could be taken during an interception, *inter alia* the possibility to board, search and seize a ship, apprehend the people on board or order it to modify its course, conducting it to a third country or a Member State participating in the Frontex operation. The draft further provided that if the ship were to be in the territorial waters or contiguous zone of a Member State, or if the ship flies the flag of a Member State or if it is suspected of having the nationality of a Member State and this in an Exclusive Economic Zone or the High Seas, these measures would have to be taken under the instructions of that Member State.

Under the heading “search and rescue operations”, units participating in the Frontex operation were to be obliged to provide assistance to any vessel or person in distress at sea and contact the relevant Rescue Coordination Centre. Under the heading “disembarkation”, the draft provided that the operational plan which needs to be drawn up for every Frontex operation, pursuant to Article 8e(1) of the Frontex Regulation,<sup>7</sup> would need to spell out the necessary modalities and that priority should be given to disembarkation in the third country from where the persons departed, or through whose waters they transited, or to the geographically closest point where the safety of the persons is guaranteed. Disembarkation should respect the principle of non-refoulement (although the Commission merely reproduced the material content of this principle, without referring to it explicitly) and the persons concerned should be informed of this so as to give them the opportunity to provide the participating units with reasons for which they believe they would be subject to inhumane treatment in the proposed place of disembarkation.

The actual decision adopted by the Council largely took over the Commission’s draft, except for the following points: the rules proposed by the Commission were split up in two parts in the annex between (binding) rules and non-binding guidelines. The headings “search and rescue” and “disembarkation” were moved to the non-binding part of the annex. The principle of non-refoulement was however explicitly mentioned and was reproduced in the binding part of the annex. Units participating in the mission could also take the measures listed in the annex against vessels flying the flag

6. European Commission, Proposal for a Council Decision supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of the operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders, COM(2009)658 final.

7. Regulation (EC) 2007/2004 of the Council establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, O.J. 2004 L 349/1.

of a third State, subject to the authorization of that State, when the vessel is situated in the High Seas. Lastly, if disembarkation is not possible in the third State, the Council provided that priority should be given to disembarkation in the Member State hosting the joint operation rather than the geographically closest point (as proposed by the Commission).

Under Article 5a(4) d-e of the Comitology Decision, if the Council envisages to adopt measures under the PRAC, the European Parliament may still block this if the proposed measures exceed the implementing powers granted or if they are incompatible with the aim and/or content of the basic instrument which is to be implemented or if they are not in accordance with the principles of subsidiarity or proportionality. The relevant Parliamentary committee indeed proposed to adopt a Resolution that would block the adoption of the measures, because they (allegedly) exceeded the scope of the enabling clause in the basic instrument (*in casu* Art. 12(5) of the SBC).<sup>8</sup> Although many MEPs had reservations, the content of the proposed decision was viewed as too important and too urgently needed in the field to block its adoption. The motion for a resolution was therefore rejected in plenary on 25 March 2010. However, the LIBE committee later (10 May 2010) unanimously requested the Legal Affairs Committee to advise the EP President to start proceedings before the Court, which it did on 23 June 2010.

The EP put forward three pleas which came down to two major arguments, firstly the rules laid down in the decision contained “essential elements” which should have been laid down in the legislation itself and could not have been the subject of the Commission’s implementing powers. Specifically, the EP claimed the decision did not merely supplement or amend the non-essential elements of the Schengen Borders Code as Article 12(5) of Regulation provided, but added new essential elements (first plea) and altered existing essential elements (second plea). It is useful in this regard to recall the recitals to the Comitology Decision which explain that the PRAC should be applied “for measures of general scope which seek to amend nonessential elements of a basic instrument adopted in accordance with the [co-decision procedure], *inter alia* by deleting some of those elements or by supplementing the instrument by the addition of new nonessential elements.”<sup>9</sup> Under its second main argument (and third plea) the EP claimed the (implementing) decision interfered with the (legislative) Frontex Regulation.

8. Motion for a Resolution on the draft Council decision supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of the operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders, B7-0227/2010, 17 March 2010.

9. Decision (EC) 2006/512 of the Council amending Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission, O.J. 2006, L 200/11.



### 3. The Opinion of the Advocate General

Advocate General Mengozzi immediately dismissed the plea of inadmissibility raised by the Council, who argued that the European Parliament could not challenge the decision and that it should have instead exercised its veto right under the PRAC procedure. The Advocate General *inter alia* referred to the established case law of the Court in which it had held that the right of action under Article 263 TFEU is not conditional on the position taken by the applicant in the procedure leading to the adoption of the contested act (paras. 16–23).

As to the substance of the case, the Advocate General commenced by recalling the Court's previous jurisprudence in which the notion of "essential elements" figured. These were mostly cases related to the Common Agricultural Policy (CAP). As regards the essential elements of the SBC, the Advocate General remarked that the case law of the Court in the sphere of the CAP should be approached with caution, since the CAP is much more isolated from issues related to human rights and the EU's international obligations than the management of the EU's external borders.<sup>10</sup> As a result, the Advocate General found that the margin of discretion should be less wide than in the case of implementation of the CAP (para 32). Whether the measures adopted by the Council related to non-essential elements of course also depended on how "additional measures governing surveillance" in Article 12(5) SBC should be understood. The Parliament understood this as referring to technical issues, whereas the Council interpreted the legislature's silence as not precluding non-technical issues. The Council further argued that because the SBC's main focus was on border checks, whilst only laying down the basic rules governing border surveillance, the legislature had left the power to work out all other rules as necessary to the Commission, subject to these rules being in conformity with the basic rules laid down in the SBC. The Commission similarly argued that the power to add new non-essential elements to legislation implies the power to impose completely new obligations or regulate new activities if this is necessary or useful to implement the basic instrument, as long as this is not contrary to the basic instrument.

The Advocate General had his doubts whether some of the measures provided for in the binding annex, for example seizing the ship, apprehending persons on board and conducting the ship to a third country, fell under the

10. However, the CAP is not completely isolated from these issues either. See e.g. the recent *Bonda* case in which the question was raised whether the combination of administrative penalties (provided for in EU legislation) and criminal penalties for making false declarations in an application for CAP funding, was in violation of the *ne bis in idem* principle. See Case C-489/10, *Criminal proceedings against Łukasz Marcin Bonda*, judgment of 5 June 2012, nyr.

notion of “border surveillance” as defined by the SBC (para 59). But the Advocate General felt that these measures related to essential elements of border surveillance, which should accordingly be laid down in the basic instrument itself (para 60). The Advocate General reached the same conclusion for the rules related to interception in the High Seas, which the Parliament claimed could not fall under border surveillance. According to the Advocate General, these rules could not have been adopted in any case since again they related to the essential elements, which should be dealt with in the basic instrument. In order to come to this conclusion, the Advocate General relied on three considerations. First, the Advocate General referred to the “sphere” of which the basic instrument formed part (i.e. the sensitive nature of border control policy). Secondly, he noted that the notion of surveillance is fundamental in the sphere of border control. Lastly, the Advocate General referred to the “strong measures” which the contested decision laid down, explicitly referring to those under the heading “disembarkation”; the competence provided to stop, board, search and seize a ship; the possibility of questioning and apprehending people on board as well as conducting the ship and the people on board to a Member State or a third country or handing over the ship and persons on board to the authorities of a third country (para 61).

The Advocate General’s analysis of the other pleas (rejecting the second and upholding the third plea) will not be dealt with in this note since the Court did not deal with these pleas.

#### **4. Judgment of the Court**

In its ruling, the Court followed the Advocate General on the Council’s plea of inadmissibility (paras. 37–41). It further followed the Advocate General by ruling that in order to determine which elements of a matter are essential and which are not one should “take account of the characteristics and particularities of the domain concerned.” (para 68) The Court further clarified that such an assessment does not depend on the view of the legislature alone, but must be based on objective factors amenable to judicial review (para 67). However, unlike the Advocate General, the Court made a link between elements which are essential and those which entail political choices, noting that “provisions which, in order to be adopted, require political choices falling within the responsibilities of the European Union legislature cannot be delegated.” (para 65)

The Court then noted that Article 12(4) of the SBC provides that the aim of “border surveillance” is to apprehend individuals crossing the border illegally, but that the SBC itself does not contain rules concerning the measures which

border guards may take when they apprehend such individuals and neither does the SBC provide for measures to be taken following the apprehension of such individuals (para 73). The Court thus seemed to express the same doubts on whether the measures in the contested decision could actually be defined as measures governing border surveillance. Just like the Advocate General, the Court did not develop this issue and went on to the question whether the measures in the contested decision related to the essential elements of the SBC.

The Court relied on two considerations to answer this question in the positive. Firstly the Court noted that deciding which enforcement powers should be exercised by border guards “entails political choices falling within the responsibilities of the European Union legislature” since it requires conflicting interests to be weighed up against each other (para 76). The Court further noted that if enforcement measures are taken against ships, the exercise of these enforcement powers might interfere with the sovereign rights of third countries depending on the flag State of the ship. This led the Court to qualify the rules in the contested decision as “a major development in the SBC system.” (para 76) Secondly the Court recalled that the powers conferred on border guards by the contested decision might interfere with the fundamental rights of the individuals concerned. The Court concluded that the adoption of the contested decision required “political choices to be made . . . Accordingly, the adoption of such provisions goes beyond the scope of the additional measures within the meaning of Article 12(5) of the SBC and, in the context of the European Union’s institutional system, is a matter for the legislature.” (para 77)

Once the Court determined that the contested decision had indeed added new essential elements, which should have therefore been included in the SBC, the decision’s annulment became inevitable. The alleged non-binding nature of the Guidelines in part II of the Annex could not detract from this as the Court remarked that the contested decision equally provided that the Guidelines should form part of the (mandatory) operational plan which is drawn up each time Frontex coordinates an operation and since that operational plan should be complied with, the non-binding guidelines had binding effect (paras. 80–2). Because the Parliament’s first plea was successful, the Court did not rule on the second and third pleas (para 85).

Since the Parliament did not contest the material rules of the contested decision (see above) it had requested the Court to maintain the decision’s effects pursuant to Article 264(2) TFEU until the decision is replaced. Given the importance of these material rules for the smooth functioning of the current and future Frontex operations the Court indeed made use of its powers under Article 264(2) TFEU (paras. 89–90).

## 5. Comment

The importance of the first two pleas of the Parliament of course greatly exceeded that of the present case as they depended upon the fundamental criterion that the Court first put forward in *Köster* to distinguish between legislative and executive powers. In that case, the Court proposed a *Wesentlichkeitskriterium*, observing “[i]t is sufficient . . . that the basic elements of the matter to be dealt with have been adopted in accordance with the [legislative] procedure.”<sup>11</sup> Although this is a very straightforward standard by which to assess the content of measures under review, its actual application is less evident. What is “essential” also depends on the area in which the measures are adopted. In its case law following *Köster*, the Court has been especially generous towards the Commission’s implementing powers in the field of the CAP.<sup>12</sup> And although the Court had clarified that this CAP case law could not simply be transposed onto other sectors,<sup>13</sup> it had not offered much further guidance on the question how to draw the line between essential and non-essential elements. Even in its distinction between the implementation of the CAP and non-CAP policies the Court was not completely clear since in its rulings related to the latter it did not hesitate to cite its rulings related to the former.<sup>14</sup>

In his Opinion, the Advocate General noted that the parties to the proceedings agreed on the importance of the judgment in this case for the post-Lisbon system of delegated acts. Unfortunately the Court did not seize this case to offer further guidance on the issue. In this regard it should be noted that the notion of “essential elements” has acquired an upgraded role under Article 290 TFEU compared to that under Article 5a of the Comitology Decision since it is now codified in primary law. In *Germany v. Commission* the Court had clarified its ruling in *Köster*, stating that if the legislature “has laid down in its basic regulation the essential rules governing the matter in question, it may delegate to the Commission general implementing power without having to specify the essential components of the delegated power; for

11. Case 25/70, *Einfuhr- und Vorratsstelle für Getreide und Futtermittel v. Köster and Berodt & Co*, [1970] ECR 1161, para 6.

12. Bianchi, “La comitologie est morte! vive la comitologie! – Premières réflexions sur l’exécution du droit de l’Union après le Traité de Lisbonne – L’exemple de la Politique agricole commune”, 48 RTDE (2012), 88.

13. Case 22/88, *Industrie- en Handelonderneming Vreugdenhil BV and Gijs van der Kolk – Douane Expéditeur BV v. Minister van Landbouw en Visserij*, [1989] ECR 2049, para 17. See also Türk, *The concept of legislation in European community law: a comparative perspective*, (Kluwer Law International, 2006), p. 229.

14. See e.g. Case C-417/93, *European Parliament v. Council of the European Union*, [1995] ECR I-1185, para 30; Case C-403/05, *European Parliament v. Commission of the European Communities*, [2007] ECR I-9045, para 51.

that purpose, a provision drafted in general terms provides a sufficient basis for the authority to act.”<sup>15</sup> However, Article 290(1) TFEU now *inter alia* provides that “[t]he objectives, content, scope and duration of the delegation of power shall be explicitly defined in the legislative acts. The essential elements of an area shall be reserved for the legislative act and accordingly shall not be the subject of a delegation of power.” The discretion of the Commission is therefore reduced under the Lisbon Treaty. Not only may the Commission’s delegated acts not touch upon the essential elements of the basic instrument, the latter will also need to spell out the objectives, content and scope of the delegation. These are two requirements that the Court will ultimately be called upon to scrutinize and which it should develop into a two-staged test when assessing the exercise of the Commission’s powers under Article 290 TFEU. Determining the essential elements of a basic instrument will therefore in the future only be the first step in assessing whether the Commission has respected the limits to its powers under Article 290 TFEU.

The Court not only failed to clarify this issue, its ruling actually raises more questions than answers and this despite the interesting propositions made by the Advocate General. The latter referred to the established case law of the Court and seemed to infer his three considerations therefrom (see above). The Advocate General first focused on the subject matter of the basic instrument, which the contested decision implemented, implying that the scope left for the adoption of delegated acts diminishes when the policy field concerned is sensitive or relates to *high politics*, as was the case *in casu*. Second, the Advocate General situated the precise subject matter of the contested decision within that of the basic instrument, implying that when the former is not related to the “core” of the latter, the scope for the adoption of delegated acts becomes greater. *In casu*, this condition was not met, since border surveillance is fundamental to border control. Third, the Advocate General referred to the far-reaching measures which the Council had adopted in its decision.<sup>16</sup> This third element is more debatable, since it would imply that whether an implementing act relates to the essential elements of the basic instrument or not, would also depend on the intensity of the measures contained in the implementing act. In general terms this would mean that the delegate authority (under Art. 290 TFEU the Commission) could affect the definition of what is essential in the mandate drawn up by the delegating authority. The reference to

15. Case C-240/90, *Federal Republic of Germany v. Commission of the European Communities*, [1992] ECR I-5383, para 41.

16. The English language version of the A.G.’s Opinion speaks of “strong measures” but *inter alia* the French and German language versions “mesures incisives” or “eingreifende Maßnahmen” better reflect the original “measure incisive”.

the intensity of the measures seems therefore out of place in the assessment of whether these measures form part of the essential elements of the basic instrument. The argument rather implicitly refers to the proportionality of the measures in the contested act and the Advocate General seems to suggest that a stricter proportionality test should be applied by the judiciary when assessing delegated legislation as opposed to the proportionality test applied to legislation adopted by the formal legislature.

The Advocate General further built on the existing case law and tried to construe an argument based on general notions that could offer further guidance for future cases and for legislative practice. The Court more or less ignored this part of the Advocate General's analysis and only referred back to his Opinion when concluding that the contested decision indeed contained essential elements of border surveillance (para 79). To come to this conclusion the Court seemed to propose a new element to determine the essential elements of a basic instrument, referring multiple times to "political choices". Although this is also an abstract notion, it does not bring any useful guidance. In fact, the Court only rephrases the content of the Treaties. After all, saying something is an essential element of a basic instrument is similar to saying it is the result of a political choice. Further, this element is also novel in the Court's case law on comitology. When the Court in the past emphasized the notion of "political choices" this was usually in proceedings whereby the validity of a legislative act was challenged. The broad discretion, which such political choices entailed for the legislature, implied that the judicial review exercised by the Court would be limited to "verifying whether there has been a manifest error of appraisal or a misuse of powers on the part of the Community institutions, or whether they have manifestly exceeded the limits of their discretion."<sup>17</sup>

The reference to "political choices" in the present ruling simply rephrases the original question into when something will or will not be the subject of a political choice. *In casu* the Court held that the contested decision entailed political choices because "it require[d] the conflicting interests at issue to be weighed up on the basis of a number of assessments." Again this remark by the Court is not helpful. If this definition of "political choices" is adopted and if "political choices" are the reserved domain of the legislature, the possibility provided by Article 290 TFEU to adopt delegated acts becomes useless. Even

17. Case T-475/07, *Dow Agrosciences Ltd v. European Commission*, judgment of 9 Sept. 2011, nyr, para 151.

when non-essential elements of legislation are amended or supplemented there will always be some conflicting interests which will have to be weighed up against each other on the basis of a number of considerations.

The Court simply postulated that the adoption of the rules in question entailed political choices (and therefore contained essential elements) and therefore did not follow the Advocate General's example in adopting a more systematic approach. Whereas the Advocate General's analysis involved three steps, the Court got stuck at stage one. As regards the subject matter, the Court observed that the contested decision laid down rules that could interfere with the sovereign rights of third countries and with the fundamental rights of individuals, both being sensitive topics. In this, the Court simply reaffirms that the policy field and subject matter in which the delegated act should be situated is an important factor in assessing what the essential elements of the basic instrument are.

Still, there is one interesting observation of the Court, when it referred to the issue of fundamental rights. The Court noted that these "may be interfered with to such an extent [by the contested decision] that the involvement of the European Union legislature is required." (para 77) This would imply that matters involving fundamental rights cannot be dealt with through delegated acts and that the latter may only marginally touch upon persons' fundamental rights.<sup>18</sup>

## 6. Conclusion

In the present case the Court missed an opportunity to shed greater light on the dividing line between essential and non-essential elements of legislation. In its ruling, the Court merely confirmed that what is "essential" also depends on the policy field concerned; the new element (i.e. the notion of "political choices") introduced by the Court is far from clarifying either. No doubt this question will come before the Court again, since Article 290 TFEU has now inscribed this dividing line in primary law to protect the reserved domain of the legislature. As such, drawing this line will be the first step the Court will have to undertake in the future to determine whether the Commission has exercised its powers in conformity with Article 290 TFEU. The second step will then be to determine whether the basic instrument sufficiently spells out

18. It should be noted that the Court did not lay down an absolute prohibition for delegated acts to affect persons' fundamental rights.

the requirements the Commission needs to observe when exercising its delegated powers and whether these requirements have been respected. The Court would therefore not only help the legislature but also itself if it could work out a more systemic approach to this problem, allowing for greater predictability and legal certainty.

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